

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

ALL SECURITY SERVICES, INC. and
TOTAL ARMORED CAR SERVICE, INC.

Joint Employer,

and

NLRB Case No. 07-RC-074834

INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS
OF AMERICA (SPFPA)

Petitioner.

**PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND
RECOMMENDATION ON OBJECTIONS AND BRIEF**

The Petitioner International Union, Security, Police and Fire Professionals of America (SPFPA) (hereinafter SPFPA) filed objections to the secret-ballot election held in the instant case on April 6, 2012. Of the approximately 73 eligible voters, 69 employees cast ballots in the election. Of the votes cast, there were 8 challenged ballots. Of the remaining ballots, 30 were cast in favor of the SPFPA, while 31 were cast for the Joint Employer.

On April 13, 2012, the SPFPA filed eight objections. In pertinent part, the SPFPA's Objections included, *inter alia*, that during the critical period and the election:

- employees were disenfranchised and the SPFPA was not able to campaign with voters due to numerous errors in the *Excelsior* list;

In addition to its objections, the SPFPA challenged the ballots of three employees. The Board election agent challenged five ballots on the basis that their names were not included on the voter eligibility list. Of the five ballots challenged by the Board, the parties stipulated prior to the

hearing that two of those employees were not eligible voters. The parties further stipulated during the hearing that another employee was not an eligible voter. Pursuant to the stipulated agreements, only five challenged ballots remained for consideration.

On May 8, 10, and 11, 2012, a hearing was held before Hearing Officer Elizabeth K. Kerwin. On June 28, 2012, the Hearing Officer issued her Report on Challenged Ballots and Objections. In her Report, the Hearing Officer recommends to the Board that the remaining ballots challenged by Petitioner be opened and that the remaining ballots challenged by the Board not be opened. The Hearing Officer further recommends that the Objections be overruled in their entirety and that the Board issue a certification of results based on the final tally of ballots. The Hearing Officer recommends that the Objections be dismissed as she concluded that the errors in the election process were insignificant or were not capable of affecting the unit employees' vote preference.

Contrary to the findings of the Hearing Officer, the record established at the hearing substantiates and validates SPFPA's Challenges and Objections. That evidence establishes that the ballot of James Sherlock should not be opened and counted. The record further establishes that a substantial and significant number of employees were disenfranchised by the fact that the laboratory conditions required for NLRB election were not present in this case.

EXCEPTIONS

The International Union, SPFPA files these Exceptions to the Hearing Officer's Report and Recommendation on Determinative Challenged Ballots and Objections:

- The Hearing Officer ignores or misapplies the record evidence that establishes that the errors in the election process disenfranchised a significant number of

employees and affected employees' vote preference by hindering SPFPA's ability to campaign with employees.

- The Hearing Officer's recommendation to dismiss the Objections raises substantial questions of law or policy because of the absence of or departure from Board precedent.
- The Hearing Officer's recommendation to open the challenged ballot of James Sherlock raises substantial questions of law or policy because of the absence of or departure from Board precedent.

The International Union, SPFPA excepts to the Hearing Officer's recommendations that Objections 6-7 be overruled, and that James Sherlock's ballot be opened and counted.

STATEMENT OF FACTS

All Security Services, Inc. and Total Armored Car Service, Inc. jointly operate as an armored car service and cash and coin warehousing service. At the subject location, they employ a bargaining unit of approximately 73 drivers, messengers, vault custodians, and coin room employees. The unit was not represented by an exclusive bargaining representative prior to the petition/election.

On February 21, 2012, SPFPA filed a Petition for Representation with respect to the bargaining unit described above. On March 1, 2012, a Stipulated Election Agreement for a secret ballot election was approved by Region 7. The Election was conducted on April 6, 2012. Following a tally of the ballots, the Petition filed its Challenges and Objections on April 13, 2012 and a hearing was ultimately held in May of 2012.

During the hearing, Petitioner presented testimony of bargaining unit employees Sean McCarron, Gary Pace, and Robert Dorton, along with several exhibits, which showed that, for

various reasons, SPFPA was not able to adequately campaign with the employees and that a significant number of employees were improperly excluded from the *Excelsior* list. The evidence produced by SPFPA also demonstrated that the challenged ballot of James Sherlock should not be opened.

In her Report on Challenged Ballots and Objections, the Hearing Officer made certain findings of fact resolving disputes between the respective documentary exhibits and witnesses with conflicting testimony. Although Petitioner does not necessarily agree with the Hearing Officer's determinations of fact, Petitioner recognizes the Board's great deference to a Hearing Officer's factual determinations. Accordingly, in filing and supporting these Exceptions, except as noted below where the Hearing Officer made clearly erroneous findings, Petitioner relies upon the factual record as determined by the Hearing Officer within her Report, supplemented with factual assertions that are part of the record that the Hearing Officer ignored or otherwise did not discredit in her Report.

ARGUMENT

CHALLENGES

The Hearing Officer's recommendation that the ballot of James Sherlock be opened should be overturned because it runs afoul of Board policy protecting the free choice of employees.

Employees who are on sick leave are presumed to be in the course of continued employment and eligible to vote unless rebutted by an "affirmative showing that the employee has been discharged or has resigned."¹

In this case, Mr. Sherlock is over 80 years old. He has not done any work for the employer since at least April of 2011. He has used up all of his short term disability as of

¹ *Cavert*, 83 F 3d 598 (3rd Cir., 1996).

October of 2011. There is nothing in the Employer's handbook about allowing its employees to remain on indefinite leave. To the contrary, on page 4 of the Joint Employer's Employee Handbook, an employee may only take up to 30 days of personal leave. "An employee who fails to return upon completion of a personal leave will be considered a voluntary quit." Based on the Employer's stated policies, Mr. Sherlock's failure to return to work for such a lengthy period amounts to an affirmative showing that he no longer works for the company and is not entitled to vote.

In terms of Board policy, Employers should not be allowed to hold onto a phantom workforce to be bussed in for elections. Doing so undermines the choice of legitimate employees. The Employer did not require Mr. Sherlock to provide any verification as to his need for extended sick leave. Despite Mr. Sherlock's age, it is possible that he was working elsewhere during that time. Any Board precedent to the contrary should be overturned as a means to protect employee choice. As such, Petitioner contends that Mr. Sherlock is no longer an employee and his vote should not be counted.

OBJECTIONS

Objection 6: A substantial and significant number of employees were disenfranchised due to numerous errors in the Excelsior list.

Objection 7: The SPFPA was not able to campaign with voters due to numerous errors in the Excelsior list.

Under *Woodman's Food Markets*, 332 NLRB 48 (2000), the Board will consider whether the number of omissions/errors on the *Excelsior* list could potentially be determinative of the outcome. The Board has set aside elections where there are substantial inaccuracies or omissions in the *Excelsior* list, as here. See, e.g. *Sonfarrel, Inc.*, 188 NLRB 969 (1971) (5 omissions, unit

size unknown but 52 voters so at most less than 10% of unit); *Gamble Robinson*, 180 NLRB 532 (1970) (11% of the unit); *Thrifty Auto Parts*, 295 NLRB 1118 (1989) (9.5%); *Chemical Technology*, 214 NLRB 590 (1974) (8.3%); *Meadow Valley Contractors*, 314 NLRB No. 40 (1994) (8.3%).

Ultimately, the Petitioner was denied an opportunity to properly campaign with the employees as a result of the several errors and/or omissions in the list. Specifically, 3 names were omitted based on Employer's good faith belief that they were not guards (Davis, Donaldson, Riley); 2 employees did not have good addresses despite Union's effort to get correct addresses from Employer (Boysnack, Adams); 1 employee was not brought to the Employer's attention, but a second envelop was sent to a new address after the employer remitted corrections (Waters); 2 employees' addresses were incorrect, but the Union did not include them on the request for corrections (Thomas, Dudzinski).

After the stipulations for Syroche, Tucker, and Gray, only 70 potential voters remain. If the Petitioner's calculations are taken as true, 8 employees out of 70 potential voters were affected – or 11.4%. Under Board precedent, that is a sufficient percentage to require a new election.

In this case, the Union lost the election by only one voter. That is, by losing the vote 31-30, if only one voter had changed their mind, the Union would have won. Under that scenario, any omissions/errors in the eligibility list could determine the outcome – for if the Union would have been given sufficient opportunity to reach out to everyone, then it may have been able to change at least one person's mind.

Assuming *arguendo* that the Board adopts the Hearing Officers recommendations and orders that all three ballots challenged by the petitioner be opened, and assuming that all three

employees voted against Petitioner, then the vote would stand at 34-30. In that case, then only 3 employees would need to change their minds in order to sway the election in favor of SPFPA. If the Board upholds Petitioner's challenge of Mr. Sherlock's ballot, then that number necessarily drops to 2.

If Petitioner had been given its rightful opportunity to campaign, and thereby communicate its message to all the voters, the employees may have convinced their fellow workers who did not vote to cast ballots in favor of the SPFPA. Petitioner might have also had a full opportunity to change the minds of any voters who were left of the list but voted anyway. But for this procedural failure, SPFPA may have won the election handily.

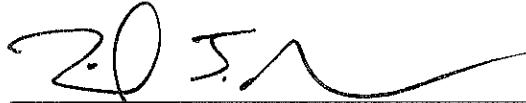
The evidence adduced during the hearing established that errors in the election process worked to disenfranchise a determinative number of employees. Furthermore, due to circumstances outside of SPFPA's control, the Petitioner was not able to adequately campaign with employees, thereby skewing the outcome of the election. Finally, because the number of errors and/or omissions from the *Excelsior* list could be determinative of the election, Board precedent requires that a new election be ordered.

CONCLUSION

Petitioner SPFPA respectfully requests that, if after a tally of all ballots deemed eligible it does not have a majority of ballots cast, the Board grant the Objections to the Election as described above and direct that a new election be held without delay.

Respectfully submitted,

GREGORY, MOORE, JEAKLE & BROOKS, P.C.

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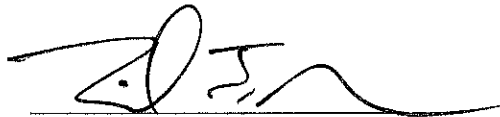
By: Michael J. Akins
65 Cadillac Square, Suite 3727
Detroit, MI 48226
(313) 964-5600

Dated: July 12, 2012

Certificate of Service

The undersigned certifies that he has served a copy of these Exceptions upon counsel for the Employer and the Region electronically and by placing it in first class mail, as follows:

David E. Jerome
LAW OFFICES OF DAVID E. JEROME
Attorney for Employer
P.O. Box 220
Northville, MI 48167

A handwritten signature in black ink, appearing to read 'M. J. Akins', written over a horizontal line.

Michael J. Akins